IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Shailendra Palod. Versus Dr. S.L. Chordia.

S.B. Criminal Misc. Petition No. 879/2004

...

Shailendra Palod. Versus Dr. S.L. Chordia.

S.B. Criminal Misc. Petition No. 328/2004

and

Shailendra Palod. Versus Dr. S.L. Chordia.

S.B. Criminal Misc. Petition No. 329/2004

Date of Order: August 21, 2006

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr. B.R. Mehta, for the petitioner.

BY THE COURT:

By these three criminal miscellaneous petitions under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code" hereinafter), the petitioner-complainant has challenged the order dated 27-3-2004 passed by the Judicial Magistrate, Chittorgarh (for short, "the trial Court" hereinafter) in Criminal Complaint Cases No. 105/2004, 114/2004 and 99/2004 respectively, whereby the trial Court dismissed the

three complaints filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act" hereinafter) in default and consigned the files to the record. Aggrieved by the order impugned, the petitioner-complainant has filed these three criminal miscellaneous petitions.

I have heard learned counsel for the petitioner. Carefully gone through the order passed by the trial Court.

Learned counsel for the petitioner has relied on a decision of this Court in Ghanshyam Das Vs. Yogesh Kumar Sapara, 2005 (1) Cr.L.R. (Raj.) 534, wherein this Court held that in the interest of justice, the trial Court should not have dismissed the complaint for absence of complainant or his counsel on one occasion, unless the Court is of the opinion that the complainant has been serving to protect the matter to harass the accused unnecessarily.

In Associated Cement Co. Ltd. Vs. Keshvanand, AIR 1998 SC 596. while considering the provisions of Section 256 of the Code, the Hon'ble Supreme Court held that two constraints are imposed on the Court for exercising the power under Section 256. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and

proceed with the case. When the Court notices that the complainant is absent on a particular day, the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned, the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.

In Mohd. Azeem Vs. A. Venkatesh & Anr., 2003 Cr.L.R. (SC) 211, the petitioner therein was prosecuting the complaint diligently and had been attending the Court of Magistrate on all dates except one because according to him, he wrongly noticed the date for hearing. Due to his absence on one day fixed for trial, the Magistrate by the order dated 22-6-2001 dismissed his complaint and acquitted the accused. On an appeal under Section 378 (4) of the Code, the appeal was dismissed by the High Court. On the matter having been carried to the Supreme Court, the Hon'ble Supreme Court held that the cause shown by the complainant of his absence that he had

wrongly noted the date, has not been disbelieved. It should have been held to be a valid ground for restoration of the complaint. Their Lordships held that the Magistrate and the High Court have adopted a very strict and unjust attitude resulting in failure of justice and further held that the Magistrate committed an error in acquitting the accused only for absence of the complaint on one day and refusing to restore the complaint when sufficient cause for the absence was shown by the complainant.

Keeping in view the decision of the Hon'ble Supreme Court in Mohd. Azeem Vs. A. Venkatesh & Anr. (supra) and Associated Cement Co. Ltd. Vs. Keshvanand (supra), in my view, the ends of justice would be met by restoring the complaint.

In this view of the matter, the criminal miscellaneous petitions No. 879/2004, 328/2004 and 329/2004 are allowed; the order impugned dated 27-3-2004 passed by the trial Court in Criminal Complaint Cases No. 105/2004, 114/2004 and 99/2004 respectively, are set aside and the complaints filed by the petitioner-complainants are restored. The matters are remanded to the trial Court to proceed with the aforesaid complaint cases after affording opportunity of hearing to both the parties.

(H.R. PANWAR), J.

mcs